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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 56

SAM FOX PUBLISHING COMPANY, INC., ET AL.,
Appellants,

v.

UNITED STATES AND AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS SAM FOX PUBLISHING COMPANY, INC., ET AL.

OPINION BELOW

The District Court wrote no opinion. The record contains the court's statement denying appellants' motion to intervene (R. 295-296), and the court's order to that effect (R. 489).[1]

[1] The printed record is referred to herein as "R. ——." The record in the District Court which has been transmitted from the court below but not printed is referred to herein as "DR. ——." For the convenience of the Court, appellants have lodged with the Clerk copies of the Hearings before Subcommittee No. 5, Select

JURISDICTION

A suit was brought by the United States against appellee American Society of Composers, Authors and Publishers (hereafter referred to as "ASCAP" or "the Society") and others on February 26, 1941, charging violations of Section 1 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. Sec. 1 (Sherman Act) (R. 8). On March 4, 1941, the District Court entered a final judgment by consent (R. 27). On March 21, 1950, the judgment was amended, again by consent (R. 35). Upon motion of the United States, the District Court on June 29, 1959, ordered that a hearing on a Proposed Consent Further Amended Final Judgment (hereafter referred to as "proposed order") be held on October 19, 1959, at which plaintiff and defendant were to show cause why the court should approve the proposed order (R. 75). On that day the District Court denied appellants' motion to intervene in the proceeding (R. 295-296) and its order to that effect was entered on November 16, 1959 (R. 489). Notice of appeal to this Court was filed on January 14, 1960 (R. 714).

On May 23, 1960, this Court entered an order directing that further consideration of the question of jurisdiction be postponed to the hearing of the case on the merits (R. 719). Appellants believe that jurisdiction to entertain this appeal is conferred on this Court by Section 2 of the Expediting Act of February 11, 1903,

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Committee on Small Business, House of Representatives, on the "Policies of ASCAP," 85th Cong., 2d Sess., pursuant to H.R. Res. 56 (March, April 1958) (hereafter referred to as "ASCAP Hearings"); and the report of the Subcommittee, H.R. Rep. No. 1710, 85th Cong., 2d Sess. (1958) (hereafter referred to as "Hearing Report").

32 Stat. 823, 15 U.S.C. Sec. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989.

STATUTES AND RULES INVOLVED

Section 2 of the Expediting Act, codified at 15 U.S.C. Sec. 29 and 49 U.S.C. Sec. 45, reads:

> "Appeals to Supreme Court.
>
> "In every civil action brought in any district court of the United States under sections 1-7 and 15 of Title 15, chapters 1, 8, 12, 13 and 19 of [Title 49], or any other Acts having a like purpose that may be hereafter enacted, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court: (Feb. 11, 1903, ch. 544, § 2, 32 Stat. 823; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; June 9, 1944, ch. 239, 58 Stat. 272; June 25, 1948, ch. 646, § 17, 62 Stat. 989.)"

Federal Rule of Civil Procedure 24 reads in relevant part:

> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action: . . .
>
> * * *
>
> "(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought . . . ."

QUESTIONS PRESENTED

1. The preliminary question of jurisdiction is whether an order of a district court denying a motion to intervene as of right filed pursuant to Federal Rule 24(a)(2) in a proceeding which is part of an antitrust suit brought by the United States may be appealed to this Court as a "final judgment" under Section 2 of the Expediting Act, 15 U.S.C. Section 29.

2. The substantive question is whether, in a proceeding brought by the United States to modify a judgment previously entered by consent in an action under the Sherman Act in order to strengthen parts of the judgment designed to protect the smaller members of an unincorporated association of music writers and publishers from unlawful injury by the dominating members of the association, some of the smaller members of the association were entitled to intervene under Rule 24(a)(2), for the purpose of securing changes in the proposed modification of the judgment which were necessary for their protection from the dominating members, upon the ground that their interest was inadequately represented by the existing parties to the proceeding—the Department of Justice and the association's Board of Directors—and that they would be bound as association members by any judgment entered in the proceeding.

STATEMENT

This appeal is taken from the denial by the District Court of appellants' motion to intervene in a proceeding brought by appellee United States to modify an antitrust consent decree against appellee ASCAP and others. The antitrust suit was begun almost 20 years ago—on February 26, 1941. An understanding of this

latest proceeding, and the nature and purpose of appellants' motion to intervene therein, requires a summary of the prior events and proceedings in the suit.

Prior Proceedings in the Government Suit

ASCAP is an unincorporated association of approximately 6,400 writers and publishers of musical compositions, of whom appellants are three of the publisher members.[2] The members grant to the Society a non-exclusive right to license the public performance of copyrighted musical works that they have composed or published. The Society's revenues are derived from license fees paid to it by those whom it has licensed to perform these works, the fees received being thereafter distributed to the members.[3]

From the outset, the suit by the Government against the Society has been concerned with alleged violations of the antitrust laws involved in two major aspects of ASCAP's operations: (1) ASCAP's dealings with those to whom it licenses the right to perform the musi-

[2] Appellant Sam Fox Publishing Company, Inc. has been a member of the Society since 1924 and is one of the three original "serious music" publisher members (ASCAP Hearings, p. 334). Appellants Pleasant Music Publishing Corporation and Jefferson Music Company have been members since 1941 and 1945, respectively (R. 295).

[3] ASCAP's Financial Statement for the year ending December 31, 1959 shows that ASCAP collected during that year, in round numbers, $30,000,000. After deduction of some $6,000,000 in expenses and $1,500,000 payable to foreign performing rights societies, the remaining $22,500,000 was distributed, pursuant to the Articles of the Society, 50% to the publisher members and 50% to the writer members (R. 125). Income received by each publisher member from ASCAP will vary, but it usually represents from one-third to two-thirds of a publisher member's gross revenue (ASCAP Hearings, pp. 203, 276, 327).

cal works of its members, and (2) ASCAP's internal arrangements with regard to the distribution by it of license fees to its publisher and writer members, and the exercise of control within the Society through the apportionment of voting power among the members (R. 15 *et seq.*). Only the second aspect of ASCAP's operations was involved in the proceeding in the District Court in which appellants sought to intervene, and only that aspect is relevant to this appeal.

This second aspect of ASCAP's operations—the alleged violations of the antitrust laws arising from the interference by the Society as an unincorporated association with the competitive relations of its members *inter sese*—was dealt with in the 1941 complaint. Paragraph 15(A), in particular, alleged that as part of a conspiracy and combination to restrain trade and commerce in various types of public performances of music, the defendants,[4] among other things, had undertaken to create the Society as an "instrumentality with a self-perpetuating Board of Directors and to vest in the twenty-four persons constituting such board the exclusive power to control the activities" of ASCAP (R. 16). The prayer for relief requested that the Society and its officers, agents and members be restrained from (1) electing the Directors other than by a procedure under which all ASCAP members would have the right to vote for their respective representa-

[4] The Society itself and certain of its officers were named as defendants. The latter were charged as defendants in their own right and as representatives of all the Society's members, who were alleged to "constitute a group so numerous that it would be impractical to bring all of them on before the Court by name" (R. 9). See pp. 58-62 below.

tives and (2) from distributing royalties received on performances of the works of its members other than in a "fair and non-discriminatory manner" according to certain enumerated, but essentially subjective, attributes of a member's catalogue of works (R. 26) as determined by the Board of Directors (see Art. XIV, Sec. 6, ASCAP Art. of Assoc., ASCAP Hearings, p. 498).

On March 4, 1941, less than a week after the complaint had been filed, a judgment by consent was entered (R. 27-34). In form—though, as later events showed, not in substance—limitations were imposed on the voting and other control exercised in the Society by the dominant group of the largest publisher members who controlled the Board of Directors through their power to elect the directors.[5] Changes were also made in the inequitable system challenged by the Government under which the Directors distributed license fees among the ASCAP members, including the publisher or writer members whom they represented on the Board (R. 32-33). These (as well as other provisions of the

[5] In the District Court, appellants repeatedly asserted their willingness to prove that for many years before the inception of the Government suit and through the time of the proceeding in which appellants sought to intervene, the voting system in the Society enabled a combination of ten of the largest publisher members and the two largest "serious music" publishers to elect their representatives to the Board of Directors and thereby to dominate the affairs of the Society and inflict unlawful competitive injury upon the smaller members (*e.g.*, R. 256, 371, 381; see also DR. 1090-1093). This voting control by the dominating publishers, which appellants maintain is perpetuated in the proposed order, bears importantly upon the adequacy of the representation of appellants' interest by the existing parties in the proceeding below and is fully treated hereafter in this Brief. See pp. 28-31, 41-47, *infra*.

expense of others, and, at the same time, ASCAP has 'weighted' the votes of its members so as to provide that those members who receive the greatest share of its revenues shall also have the largest number of votes. The vice of the system is that it gives those members in ASCAP who receive the largest share of ASCAP's revenues the power to elect the directors of the Society, who, in turn, have the power to establish the rules governing the Society's system of distribution, which, in turn, determines which members shall receive the largest share of the Society's income."

The Proceeding in Which Appellants Were Denied the Right to Intervene

By 1958, the Department of Justice was apparently prepared to move for further relief under its express reservation of a right to do so in Article XVII, referred to *supra*, p. 8 (see R. 49). At the request of the Society's Directors, however, the Department of Justice instead entered into negotiations with the Society, through its Board of Directors, and ultimately agreed with the Directors upon a proposed order amending the 1950 judgment (R. 49-50). The proposed amendments dealt with the following areas of ASCAP's internal operations:

1. The right of ASCAP members to withdraw from ASCAP.
2. The requirement that ASCAP scientifically conduct a survey of the performances of the compositions of its members as a basis upon which to make distribution of its revenues to its members.
3. The manner in which ASCAP shall make distribution of such revenue to its members.
4. The limitation on the extent to which ASCAP may weight the votes of its members.

5. The manner in which ASCAP shall assure its members of equal treatment and an adequate opportunity to protect their rights within ASCAP; and

6. The obligation upon ASCAP to admit all duly qualified applicants to membership (R. 119-120).

Upon motion of the Department of Justice, the court below on June 29, 1959 (R. 75-76), ordered that a hearing on the proposed amendments be held on October 19, 1959, at which the Department and ASCAP were to show cause why the proposed order should be approved. The court's order further directed that:

> "any party or individual who has an interest affected by these proceedings may appear at such hearing and make application to be heard upon the ground that the [proposed order] will not accomplish the antitrust purpose of this suit."

Having been informed that the District Court's order of June 29 would permit ASCAP members other than those constituting the Board of Directors to participate in the October 19 proceeding only as *amici curiae*, appellants moved pursuant to Rule 24(a)(2) to intervene in the proceeding in order to present proof that the proposed order would not "accomplish the antitrust purpose of this suit," and to urge changes in the proposed order which they considered necessary to protect them and other ASCAP members from the dominating publisher members (R. 251). In support of their motion to intervene, appellants undertook to establish, pursuant to Rule 24(a)(2), that neither the Society's Board of Directors nor the Department of Justice adequately represented their interests in the proceeding as ASCAP members, and that they would be bound by the District

Court's approval of the proposed order. Appellants set forth their views in a Pleading in Intervention filed pursuant to Rule 24(c) (R. 252) and in detailed supporting memoranda containing offers of proof (DR. 259-297, 1074-1144).

Appellants asserted, and offered to prove, that the Board of Directors, who had negotiated the proposed order with the Department of Justice, was comprised of representatives of the dominating publisher members and other publishers associated with them by business dealings or ownership interest. The domination of the Society's affairs by these publishers, to the detriment of the competitive position of its smaller members such as appellants, had made necessary the original 1941 judgment, its strengthening in 1950, and now the further amendments being proposed (R. 368, 371, 380-381; DR. 279-285).[8] For this reason, appellants maintained, the Directors' interests were exactly antagonistic to theirs, and hence the Directors could not adequately represent appellants' interest in securing protection from the dominating publisher members of the Society through a modification of the 1950 judgment.

To establish that the Department of Justice inadequately represented their interest, appellants analyzed the provisions of the proposed order and pointed out that it effected no substantial change in the existing undesirable situation in the Society with respect to voting control and the distribution of license fees to the members (R. 373-407; DR. 1093-1141). Appellants

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[8] See ASCAP Hearings, pp. 51-52, 214-215; Hearing Report, p. 3; Department of Justice Memorandum of Sept. 2, 1959 filed in the court below in support of the proposed order (R. 119, at pp. 140-141).

proposed to prove, *inter alia*, that the voting provisions of the order (Section IV) left the dominating publisher members with more than 41 per cent of the total possible vote of the publisher members and with some 50 per cent of the actual publisher member vote as cast and treated as valid in past ASCAP elections (DR. 1093-1109). They likewise offered to prove that Section II of the proposed order, dealing with the ASCAP survey of public performances of music which supplies the information that is the basis for distributions of revenues to the Society's members, failed in any substantial way to require a more accurate and reliable means of securing such information. Particularly was this so, appellants maintained, because the proposed order still permitted information as to whether and for what purpose a work had been performed to be collected by personnel who were controlled by the dominating publishers through their representatives on the Board of Directors (DR. 1110-1124). Further, appellants offered to prove that the formula adopted pursuant to Section III(F) for distributing license fee revenues to ASCAP members gave arbitrary preference largely to the works of the dominating publishers (DR. 1125-1141).

Appellants urged in the court below that these proposed amendments to the 1950 judgment perpetuated fundamental inequities in the competitive relation of ASCAP's members with one another, and that the consent of the Department of Justice to such amendments conclusively established that the Department inadequately represented appellants' interest in securing protection from the dominating members of the Society. Appellants further maintained that they would be bound as members of the Society by any

modification of the 1950 judgment the court would approve.

The District Court, summarily and without findings or opinion, denied appellants' motion to intervene at the opening of the October 19 proceeding and permitted them to appear only as *amici curiae* (R. 295-296). In the course of the proceeding, however, the court stated three grounds on which it had denied the motion (R. 381-382) and incorporated these grounds in its order of November 16, 1959 (R. 489):

(a) that appellants were represented by the Society's Board of Directors with their consent because they were members;

(b) that appellants were not named parties to the antitrust suit against ASCAP and the suit had proceeded to a consent judgment;

(c) that appellants' interest was represented by the Government in the person of the Attorney General.

After hearing Department of Justice attorneys and counsel retained by the Directors, and after hearing *amici curiae*, including appellants, the court below ordered that a vote of the members of ASCAP be taken to determine whether or not they approved the proposed order (R. 477). The Society was directed to conduct a ballot in which each member would exercise one vote, as well as a ballot on the weighted vote basis established under the 1950 judgment and the Articles of Association (R. 481).

The results of the membership vote were announced at a further proceeding before the District Court on January 6 and 7, 1960. Of 1092 publisher members who cast valid ballots, 440, or more than 40

per cent, voted against the proposed order; of 4262 writer members who cast valid ballots, 1285, or slightly more than 30 per cent, voted against the order (R. 655). The proposed order, moreover, secured the approval of only slightly more than a majority, 56 per cent, of all the ASCAP members who were eligible to vote, and less than a majority, 47.7 per cent, of all the publisher members eligible to vote (R. 655).[9]

At the close of the proceeding of January 7, the District Court approved the order as originally proposed, with some changes to which the Department and the Society's Director's had consented (R. 590, 659, 667).

SUMMARY OF ARGUMENT

I

There is no foundation for appellees' claim that the Court lacks jurisdiction of an appeal from the denial of a motion to intervene as of right in an antitrust proceeding brought by the United States. The Court has previously ruled that a district court's order denying such a motion is a "final judgment" that may be appealed directly to this Court under Section 2 of the Expediting Act (15 U.S.C. Sec. 29). *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137; *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19; *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502. Indeed, this is a jurisdictional

[9] These figures are derived as follows: 5,092 writers and 1,365 publishers—or 6,457 ASCAP members—were eligible to vote (R. 559-560). The number of writer and publisher members voting to approve the proposed order was 3,629, or 56.2 per cent of the 6,457 members eligible to vote. The number of publisher members voting to approve the proposed order was 652, or 47.7 per cent of the 1,365 publishers eligible to vote (R. 655).

rule of general applicability. *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U.S. 519.

II

The showing made by appellants in the District Court fully satisfied the requirements for intervention as of right pursuant to Rule 24(a)(2). Neither of the two existing parties to the proceeding in the court below—the Society represented by its Directors, and the United States represented by the Department of Justice—adequately represented appellants' interest and the interest of the ASCAP general membership in securing protection from anti-competitive activities of a dominating group of the largest publisher members.

The publisher members of the Society's Board of Directors have for many years been comprised largely of representatives of a group of the largest publishers who have controlled the voting and the affairs of the Society to the injury of the ASCAP general membership. This domination of the Society by the largest publishers, to the injury of the smaller members of the Society such as appellants, was one of the two violations of the antitrust laws alleged in the suit brought by the United States against the Society and its members in 1941; it was a basis upon which the Department of Justice sought further antitrust relief in the 1950 amendment to the 1941 consent judgment; and it was the primary basis asserted by the Department for the proposed order modifying the 1950 judgment that was before the District Court in the proceeding below. In negotiating the proposed order with the Department, the Directors of the Society, because of their interest in continuing as much as possible the domination of the Society by this group of

largest publishers, had an interest exactly antagonistic to that of appellants. Hence, the Directors could not adequately represent appellants' interest in securing protection from those same dominating publishers through a modification of the 1950 judgment.

The interest of appellants was likewise not adequately represented by the Department of Justice. Appellants made a showing in the District Court that was sufficient to establish that the proposed order amending the 1950 judgment which the Department of Justice had agreed to with the Directors would be wholly inadequate either to eliminate the control by the dominating publishers of the voting and the affairs of the Society, or to secure protection for the ASCAP general membership from the anticompetitive activities of these publishers. Appellants, moreover, were members of the only group—the ASCAP general membership—on whose behalf the Department of Justice purported to act in sponsoring the proposed order. In these circumstances, the fact that the Government was one of the parties, and that the Attorney General traditionally represents "the public interest," provided no basis for denying the intervention sought by appellants. *Kaufman* v. *Societe Internationale*, 343 U.S. 156; *United States* v. *Reading Co.*, 273 Fed. 348, *modified and affirmed, Continental Insurance Co.* v. *United States*, 259 U.S. 156.

Appellants satisfied the further requirement of Rule 24(a)(2) that one who seeks to intervene must be bound by a judgment in the proceeding. Irrespective of whether the suit by the United States against the Society and its members is considered to be a representative action under Rule 23(a) of the Federal Rules or a suit against the Society as an "entity" under

Rule 17(b), any judgment entered, such as the proposed order modifying the 1950 judgment, has a *res judicata* effect upon the ASCAP general membership, including appellants. Such a judgment bars the ASCAP members from seeking further protection under the antitrust laws from the anticompetitive activities of the dominating publishers; their rights in this respect have been determined in the proceeding brought by the United States. *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356.

III

Although the matter is not clear, the District Court and appellee United States appear to have opposed the intervention sought by appellants in part upon the belief that, as parties, appellants could veto adoption of any modification of the 1950 judgment. This is incorrect. A modification of the 1950 judgment may be sought by the United States and, after appropriate notice and hearing, ordered by the District Court over the objection of the Society or of the appellants were they permitted to intervene. Such power is reserved by the express terms of the 1950 judgment itself. But even if it were not, a district court has inherent power to order a contested modification of any antitrust consent judgment it has previously entered. *Hughes* v. *United States*, 342 U.S. 353; *Liquid Carbonic Corp.* v. *United States*, 350 U.S. 869; see also *System Federation* v. *Wright*, No. 48, October Term, 1960, decided January 16, 1961.

ARGUMENT

I

A DISTRICT COURT'S ORDER DENYING A MOTION TO INTERVENE AS OF RIGHT IN AN ANTITRUST PROCEEDING BROUGHT BY THE UNITED STATES MAY BE APPEALED DIRECTLY TO THIS COURT AS A "FINAL JUDGMENT" WITHIN THE MEANING OF THE EXPEDITING ACT

Appellees challenge the jurisdiction of this Court to review the denial of a motion to intervene as of right under Rule 24(a). They assert that the denial of such a motion to intervene is not a "final judgment" of a district court which may be appealed to this Court under Section 2 of the Expediting Act (15 U.S.C. Sec. 29), and that an appeal lies only from the antitrust decree itself. Since the Court has reserved decision on this question, we address ourselves to it at the outset. We believe that the jurisdiction of the Court is firmly established.

The question of jurisdiction raised by appellees is readily resolved on the basis of the distinction which this Court has drawn, both in antitrust suits and other cases, between appeals from the denial of intervention when it is claimed as of right, and appeals in which the denial of intervention is within the discretion of the trial court. Both types of intervention are recognized in Rule 24. The distinction established by this Court with respect to appeals from orders denying intervention has derived from the essential feature of each type of intervention—one being "as of right", the other "permissive" or discretionary. An appeal is permitted from an order denying intervention of the first type, but not of the second.

This distinction and this rule are forcefully demonstrated by the decision in *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, an antitrust appeal under Section 2 of the Expediting Act. Allen Calculators, a competitor of the antitrust defendant, had sought to intervene in a district court proceeding in which the Government had opposed the defendant's acquisition of another competitor as violative of an existing decree. Intervention was sought both as of right under Rule 24(a) and as an exercise of the district court's discretion under Rul 24(b). The district court refused intervention on both grounds, and Allen Calculators appealed to this Court under the Expediting Act from the order denying intervention.

The opinion of the Court dealt with the two grounds for intervention separately. In affirming the denial of intervention as of right, this Court sustained its jurisdiction to entertain such an appeal. The Court considered the grounds advanced by Allen Calculators to support its motion to intervene as of right and found them all wanting under Rule 24(a). Nevertheless, the Court expressly recognized, citing another antitrust case, *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, that where "as to the intervenor, the action [of the court below] was final", the appeal from the order denying intervention would be entertained. 322 U.S. at pp. 140-41.

Only thereafter did the Court turn to the appeal from the denial of permissive intervention under Rule 24(b). It ruled that an order denying such intervention was an exercise of discretion by the lower court, and "[t]he exercise of discretion in a matter of this sort", the Court declared, "is not reviewable by an appellate court unless clear abuse is shown; and it is

not ordinarily possible to determine that question except in the light of the whole record." *Id.* at p. 142.

Another antitrust case, *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19, states the applicable rule concisely, and in terms squarely at odds with the position taken by appellees here (pp. 20-21):

> "If appellant may intervene as of right, the order of the court denying intervention is appealable. See *Railroad Trainmen* v. *B. & O. R. Co.*, 331 U.S. 519, 524; 32 Stat. 823, as amended, 15 U.S.C. (Sup. II) § 29. It was to resolve that question that we postponed the question of our jurisdiction of the appeal to the hearing on the merits." [10]

A third antitrust decision, *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, likewise involved a direct appeal from the denial of intervention as of right. This Court found that the authority for intervention as of right sought by the appellant derived from the provisions of the antitrust decree itself. In so ruling the Court must have been of the view that it had jurisdiction to construe the terms of the decree involved in the *Pipe Line* case and the right to intervene asserted by the appellant thereunder. Surely, therefore, the Court has jurisdiction here to construe

[10] No significance can be attached to the fact that in the Sutphen Estates case the appeal was taken from the antitrust decree itself as well as from the district court's order denying intervention. This was required, as the Court made clear in the Allen Calculators case, *supra*, because the appellant sought to have this Court also review the denial of permissive intervention under Rule 24(b). See 342 U.S. at p. 23. There is no indication in the Sutphen Estates opinion that this Court would not have decided the appeal on its merits had the appeal been taken only from the district court's order denying the motion to intervene as of right.

Rule 24(a) and the right to intervene appellants assert under the rule, and no significant distinction is warranted between two such equally compelling sources of intervention as of right. Denial of appellants' requested intervention here was, no less than in the *Pipe Line* case, "a definitive adjudication, and so appealable." See 312 U.S. at p. 508.

Nor may any distinction be drawn between the appeal taken in the *Pipe Line* case and the instant appeal on the ground that here the District Court has already approved the proposed order modifying the 1950 judgment against ASCAP. In fact, the lower court in the *Pipe Line* case had rendered an "opinion" on the merits of the proceeding in which intervention had been sought. In commenting upon the opinion of the court below in the *Pipe Line* case, and apparently treating it as a "judgment", the Court stated that it would "assume that the District Court will adjust the right which belongs [to the intervenor] with full regard to that public interest which underlay the original suit." 312 U.S. at p. 509. The District Court below could no doubt take similar action were this Court to hold that appellants here should have been permitted to intervene under Rule 24(a). If appellants are permitted to intervene, it will become appropriate for the District Court to entertain a motion—made by appellants or perhaps by the Government—to vacate the judgment of January 7, 1960, and to conduct further proceedings to modify the antitrust decree.

Brief comment is appropriate upon one other antitrust decision of the Court which appellees considered to have some bearing upon the jurisdictional question. *United States* v. *California Cooperative Canneries*, 279

U.S. 553. That decision held no more than that the Expediting Act precluded an appeal to a court of appeals by one who had been denied permission to intervene in a Government antitrust suit. The Court did not deal with the question of what orders could be appealed to this Court under that statute except to state generally that appeals were to be taken from decrees "which disposed of all matters," not "from an interlocutory decree." 279 U.S. at pp. 557-558. However, the Court cited *Collins* v. *Miller*, 252 U.S. 364, which expressly recognized that an appeal may be taken from a denial of intervention as of right in one of the situations specifically provided for in Rule 24(a)—where the applicant will be adversely affected by a disposition of property which is subject to the court's control. *Id.* at pp. 370-371. See to the same effect, *Credits Commutation Co.* v. *United States*, 177 U.S. 311, 316.

The principles applied by the Court in determining its jurisdiction to hear appeals from judgments denying intervention in antitrust cases are, of course, no more than illustrative of principles generally applied. In *Brotherhood of Railroad Trainmen* v. *B. & O. R. Co.*, 331 U.S. 519, which is not an antitrust case, the Court stated the general rule (pp. 524-525):

> "Our jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the applicant's right to intervene. If the right is absolute, the order is appealable and we may judge it on its merits. But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable and we lack power to review it. In other words, our jurisdiction is identified by the necessary incidents of the right to intervene

> in each particular instance. We must therefore determine the question of our jurisdiction in this case by examining the character of the . . . right to intervene in the proceeding . . . ."

In the *Railroad Trainmen* case the Brotherhood, a union representing employees of a railroad which operated switching facilities connecting various trunk lines, sought to intervene in a suit by the trunk lines to enjoin the switching railroad and its employees from violating an order of the Interstate Commerce Commission, pursuant to which the trunk lines had used their own equipment and crews in switching operations. The Brotherhood and the switching railroad had entered into an agreement authorizing the latter's employees, rather than those of the trunk lines, to conduct the switching operations.

The Brotherhood had asserted unsuccessfully in the district court that either of two federal statutes conferred upon it an unconditional right to intervene under Rule 24(a). The Brotherhood thereupon appealed directly to this Court under Section 210 of the Judicial Code of 1911, 28 U.S.C. Sec. 47a (1946 ed.), which authorized such direct appeals from "a final judgment or decree" of a district court in suits to enforce, suspend or set aside an order of the Interstate Commerce Commission other than for the payment of money.[11] In holding that the Brotherhood was entitled to intervene as of right, the Court set forth at length the grounds for the distinction between the appealability of orders with respect to the two types of inter-

[11] Section 238 of the then Judicial Code (28 U.S.C. Sec. 345) combined into one section the substantive provisions of the Code, including Section 210, that authorized direct appeals to this Court.

vention. The paragraph preceding that already quoted reads (331 U.S. at p. 524):

> "Ordinarily, in the absence of an abuse of discretion, no appeal lies from an order denying leave to intervene where intervention is a permissive matter within the discretion of the court. *United States* v. *California Canneries*, 279 U.S. 553, 556. The permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case. He is at liberty to assert and protect his interests in some more appropriate proceeding. Having no adverse effect upon the applicant, the order denying intervention accordingly falls below the level of appealability. But where a statute or the practical necessities grant the applicant an absolute right to intervene, the order denying intervention becomes appealable. Then it may fairly be said that the applicant is adversely affected by the denial, there being no other way in which he can better assert the particular interest which warrants intervention in this instance. And since he cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene, the order denying intervention has the degree of definitiveness which supports an appeal therefrom. See *Pipe Line Co.* v. *United States*, 312 U.S. 502, 508." [Footnote omitted.]

This language is too plain for any misunderstanding. It fully expresses the Court's view that in a suit in which a "final judgment" may be appealed directly to this Court, a district court's denial of a motion to intervene as of right constitutes such a judgment and will support a direct appeal.[12] The commentators,

[12] The Railroad Trainmen case is significant for the full consideration the Court gave to the question whether an order denying

without exception, are to the same effect. See, *e.g.*, Stern & Gressman, *Supreme Court Practice*, p. 37 (2d ed. 1954); Wolfson & Kurland, *Jurisdiction of the Supreme Court of the United States*, pp. 306-307 (1951); 4 Moore, *Federal Practice*, pp. 102, 106 (2d ed. 1948); 2 Barron & Holtzoff, *Federal Practice and Procedure*, p. 235 (Rules ed. 1950); Moore & Levi, *Federal Intervention*, 45 Yale L.J. 565, 581-582 (1936); 7 *Cyclopedia of Federal Procedure*, pp. 48-49 (3d ed. 1951).

II

APPELLANTS' MOTION TO INTERVENE UNDER RULE 24 (A)(2) SHOULD HAVE BEEN GRANTED

Rule 24(a)(2) provides for intervention as of right—

> "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; . . ."

Appellants' motion to intervene (R. 251) alleged that both requirements of the rule were met—that they were inadequately represented in the proceeding to modify the 1950 judgment, and that they would be bound as

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a motion to intervene as of right is a final judgment. The reasoning of that case, however, differs in no way from the approach taken by the Court in reviewing under the Expediting Act district court orders denying intervention in Government antitrust suits. Indeed, the Court's combined citation in its Sutphen Estates opinion (see p. 21, *supra*) of the Railroad Trainmen case and the codification of Section 2 of the Expediting Act relating to antitrust appeals (15 U.S.C. Sec. 29) suggest that the Court saw no distinction between direct appeals taken under that statute from a denial of intervention as of right in antitrust cases and such appeals under other statutes providing for direct appeals from "final judgments" of district courts.

members of ASCAP by any modification the court might order.

In denying appellants' motion, the District Court had before it, in addition to the motion itself, the proposed order modifying the 1950 judgment, together with a memorandum of facts and arguments in support of the proposed order which had been submitted by the Department of Justice (R. 119-146), appellants' Pleading in Intervention (R. 252-258) and two supporting memoranda dated October 13 and October 19, 1959 (DR. 259, 1074), and memoranda in opposition to the motion filed by the Department of Justice and by counsel retained by the Directors of the Society. There was no evidence received or testimony taken in connection with the motion to intervene. Indeed, it was denied without opportunity even for argument (R. 295-296).

In these circumstances, there were no issues of fact before the District Court, and no findings of fact with respect to whether appellants had satisfied the requirements of Rule 24(a)(2). Rather, that court concluded that the claims asserted by appellants were insufficient as a matter of law. That, then, is the issue here. We propose to establish that the claims asserted by appellants fully satisfied the conditions for intervention as of right under Rule 24(a)(2).

A. REPRESENTATION OF APPELLANTS' INTEREST BY THE EXISTING PARTIES IS OR MAY BE INADEQUATE

The two "existing parties" to the proceeding in the District Court to modify the 1950 judgment were the United States, as plaintiff, and ASCAP, represented by its officers and Board of Directors, as defendant. Appellants recognized that the nature of the pro-

ceeding was such that it was incumbent on them to establish that their interest was not adequately represented by either party. We submit that their showing to the District Court, which we summarize below, was fully adequate to meet the requirements of Rule 24 (a)(2).

1. THE LACK OF ADEQUATE REPRESENTATION BY THE SOCIETY'S OFFICERS AND BOARD OF DIRECTORS

The portions of the 1950 judgment that were before the District Court for amendment in the proceeding below were those which dealt with the competitive relations of the Society's members *inter sese*. In that area there can be no doubt that the Board of Directors of the Society are unable to represent appellants' interest in securing adequate protection from unlawful competitive injury by the dominating publisher members.

The twelve publisher members of the Board have been for many years, and are now, comprised largely of representatives of the largest publishers and other publishers associated with them by business dealings or ownership interest. The control by the large publishers of the distribution of license revenue to publisher members, and to a very considerable extent of the Society as a whole,[13] was achieved initially and

[13] ASCAP's Board of 24 Directors is in effect two co-existing boards, each elected by the publisher members and writer members of the Society, respectively. One "Board" consists of 12 publisher representatives who supervise the distribution of license revenues to publisher members, and the other consists of twelve writers who supervise distributions to writer members. As publisher members, appellants are primarily concerned with the domination exercised by the largest publishers over the publisher "Board" of the Society. Nevertheless, by reason of the business practices that exist in the

maintained in the period before the 1941 judgment through provisions in the Society's Articles of Association empowering the Directors to elect their own successors.[14] The 1941 judgment sought to make the Directors accountable to all the ASCAP members by requiring that the right to vote for directors be extended to all the membership (1941 judgment, Art. II(9), R. 32). But because the 1941 judgment permitted "due weight" to be given to the "classification" of ASCAP members, the dominating publishers were able to retain control of the election of the publisher-Directors by apportioning votes according to the revenues each publisher member received from the Society.[15] Since the Directors had absolute power to apportion revenues under the Society's Articles of Association as they were interpreted by the Board, the Directors had absolute power to apportion votes.

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music industry, under which copyrights are exploited and controlled by the publishers either on assignment from, or as agents for, the writers, the publishers are more influential in the Society's affairs and in its Board of Directors. See ASCAP Hearings, pp. 56-57, 156. Accordingly, the publisher directors exercise a measure of control over the writer directors.

[14] For example, Article IV, Sec. 1, which was in effect at the time of the 1941 consent decree, read in part as follows (ASCAP Hearings, pp. 230-231):

> "The Government of the Society shall be vested in and its affairs shall be managed by a Board of twenty-four directors. They shall be elected at each annual meeting of the Board of Directors by a two-thirds vote of the entire Board and shall continue until their successors are elected. . . ."

[15] Beginning after entry of the 1941 judgment, voting rights were "weighted" among the members of the Society as follows: each publisher member exercised one vote for every $500 of revenue received during the year preceding the election to the Board of Directors, and writers exercised one vote for each $20 of revenue received. ASCAP Hearings, pp. 230, 487.

This situation did not change in any essential respects in the Board's operations under the 1950 judgment and existed at the time of the proceeding in the court below. Under the system of voting in effect under the 1950 judgment, the ten largest publisher members, by the admission of counsel retained by the Society's Directors, held about 63 per cent of the total publisher vote at the time of the proceeding in the court below (R. 178, 219).[16] Indeed, the continued domination by the large publisher members formed one of the grounds upon which the Government itself supported the proposed order amending the 1950 decree.[17]

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[16] Figures showing the revenue received, and hence voting strength exercised, by nine of the 12 dominant publisher members for the years 1951-1958, as computed by appellants from information supplied by the Society's Directors, indicate that the large publishers held comparable voting power during this entire period. See DR. 1090-1094, 1142. The rest of the publisher vote was widely dispersed among the more than 1,000 remaining publisher members.

[17] The Government's memorandum to the District Court in support of the proposed order declared (R. 119, at p. 140):

> "While ASCAP's nominating committee nominates members with different participation in ASCAP's revenues, these men cannot truly represent the members having small participation in the Society's revenues since their election is dependent on the votes of those members having large participation in the Society's revenues. Members having large participation in ASCAP's revenues (less than 5 per cent of the writer members and less than one per cent of the publisher members) have the power to elect all of the Society's directors. Those having smaller participation in the Society's revenues (more than 95 per cent of the writer members and more than 99 per cent of the publisher members) do not have the combined power to elect a single director."
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> ". . . The Board has complete control of the affairs of the

Nor is there room for doubt that the Directors have in the past acted to further the competitive interest of the dominating publishers to the detriment of the other members of the Society. Numerous illustrations of the Directors' abuse of power are found in the sworn testimony of ASCAP publishers in the ASCAP Hearings conducted in 1958 by a Subcommittee of the House of Representatives Small Business Committee and in the subcommittee's Hearing Report.[18]

Hence it was clear that the Society's Board of Directors, composed as it is of representatives of the dominating publishers, had interests which were squarely and necessarily in conflict with those of appellants and other smaller members of ASCAP, and was in no position to represent appellants' interest in securing protection from the dominating publishers through a modification of the 1950 judgment. The slight concessions to the interests of the smaller members of ASCAP which were wrung from the Directors in the proposed order cannot mask their continued interest in retaining, at the expense of the other members, as much control as possible by the dominating publishers over the Society's affairs.

Society. It elects the officers; its members act as the writers and the publishers classification committees; it appoints all other committees; it is in large measure self-perpetuating for it elects the committee which has the power of nominating candidates for the Board of Directors."

[18] ASCAP Hearings, pp. 26-31, 34, 70, 83, 109-118, 148-149, 328, 341-346; Hearing Report, pp. 5-7. See also Government Memorandum of September 2, 1959 (R. 119, at pp. 142-144). The same conclusion is reached in a report to the congressional subcommittee from its staff which was before the court below in the October 19 proceeding and which is part of the record in this appeal (DR. 1069-1073).

The reaction of the District Court to this showing by appellants is not clear. The court does not appear to have concluded that the Board of Directors could or would in fact represent the interest of appellants, but rather to have decided that appellants were barred from raising any such objection. The court first stated that because appellants were members of the Society, they had "therefore surrendered [their] right to intervene as individuals" (R. 295). Later the court restated this ruling as follows (R. 381):

> "I denied you the right to intervene first, because you were represented by the Society, and by the Society with your consent, you having become a member of it."

The final order (R. 489) is to the same effect: "Having found . . . that applicants are members of and are represented by the Society with their consent . . . ."

These statements suggest that the court may have been of the view that in no circumstances could appellants—or, indeed, any other ASCAP members—establish that they were inadequately represented by the Society's directors. If this was the court's position, we submit that it is at odds with a long line of decisions which grant to a member of a group which is a party to a suit the right to intervene to protect his interest when it will not be protected by those who would normally be expected to do so. Persuasive authority is found in the field of corporate law, where intervention as of right by a shareholder has been authorized on the ground that the corporation, a party to the suit, was in the control of the opposing party or others whose interest was antagonistic to that of the shareholders. In *Park & Tilford Co. v. Shulte*, 160 F. 2d 984 (2d Cir.

1947), *certiorari denied*, 332 U.S. 761, a shareholder was permitted to intervene to recover "insider" profits from trading in the corporation's stock by its officers who were the defendants in the action and who controlled the corporation. Intervention as of right by a shareholder was also authorized where the opposing party had obtained control of the corporation during litigation that had been commenced by the corporation, *Golconda Petroleum Corp.* v. *Petrol Corp.*, 46 F. Supp. 23 (S.D. Calif. 1942), or where the directors of the corporation in charge of a suit were themselves alleged to have been implicated in the wrongdoing, *Pyle-National Corp.* v. *Amos*, 172 F. 2d 425 (7th Cir. 1949). See to the same effect *Cuthill* v. *Ortman-Miller Machinery Co.*, 216 F. 2d 336 (7th Cir. 1954); *Pellegrino* v. *Nesbit*, 203 F. 2d 463 (9th Cir. 1953); *Twentieth Century Fox Film Corp.* v. *Jenkins*, 7 F.R.D. 197 (S.D.N.Y. 1947).

Apparently, the District Court would have left open to an ASCAP member who is aggrieved by the Directors' representation of his interest only the path of resigning from the Society. The court suggested that a writer or publisher did not have to remain a member of ASCAP but could withdraw at any time. See R. 362-363, 388, 402. Not only does the law not compel such a choice but, as the court below must have been aware, resignation is in fact not feasible for any ASCAP member who hopes to continue to earn his livelihood as a music writer or publisher. Acting alone, individual composers and publishers would be physically unable to detect and prevent infringement of their copyrighted works by those who performed their compositions publicly for profit. This was recognized by the court below in a private antitrust suit brought against the Society. *Alden-Rochelle, Inc.* v.

ASCAP, 80 F. Supp. 888, 891 (S.D.N.Y. 1948). In fact, the futility of individual licensing and enforcement is widely recognized.[19] See Finkelstein, *The Composer and the Public Interest—Regulation of Performing Rights Licensing Societies*, 19 Law & Cont. Prob. 275-278, 284 (1954); *BMI, Inc.* v. *Taylor*, 55 N.Y.S. 2d 94, 100 (Sup. Ct. 1945). The two other performing rights societies in the United States, moreover, present no alternative, particularly for a publisher who might desire to withdraw from ASCAP. Both of these societies are corporations that are controlled by special interests. *Affiliated Music Enterprises, Inc.* v. *SESAC, Inc.*, 160 F. Supp. 865, 870 (S.D.N.Y. 1958), *aff'd* 268 F. 2d 13 (2d Cir. 1959), *certiorari denied*, 361 U.S. 831; *Schwartz* v. *BMI, Inc.*, 180 F. Supp. 322, 326 (S.D.N.Y. 1959).

2. THE LACK OF ADEQUATE REPRESENTATION BY THE UNITED STATES

Before we state the showing made by appellants as to the inadequacy of the representation of their interest by the United States, a preliminary comment is warranted. Appellants appreciate that the United States, acting through the Department of Justice, is by law and tradition the representative of the public interest in Government antitrust suits. This premise, however, does not support the conclusion that private parties can never satisfy the requirements for intervention as of right under Rule 24(a)(2), whatever the nature of the antitrust proceeding in which intervention is sought. There will be times in the field of public litigation, including litigation under the antitrust laws, when the proceeding so unmistakably calls for participation

[19] The Government acknowledged this in the proceeding below (R. 139).

by private parties whose rights will be determined therein that the strongest case is made for the application of Rule 24(a)(2). We suggest that in this sense the Rule provides a fundamental protection to private parties when Government agencies designated by law to protect their rights in fact fail to do so.

Prior decisions of this and other courts illustrate this application of the Rule. In *Kaufman* v. *Societe Internationale*, 343 U.S. 156, the position of the Government agency with respect to the interest of the parties seeking to intervene was not unlike that of the Department of Justice here. The appellants there, non-enemy stockholders of a corporation dominated and controlled by enemy aliens, had been denied intervention as of right in a suit brought by the corporation to recover assets seized by the Alien Property Custodian. The appellants contended that they and other non-enemy stockholders were entitled to the return of a portion of the seized assets that represented their untainted investment in the corporation. The management of the corporation and the Alien Property Custodian were both of the view that the interests of enemy and non-enemy stockholders should be treated alike and that the two groups should share in the proceeds of the sale of the seized assets. Influenced by the fact that both the corporate management and the governmental agency had taken positions antagonistic to the non-enemy stockholders, the Court held that intervention should have been allowed under Rule 24(a)(2). See 343 U.S. at pp. 161-162.

Relying in part on the *Kaufman* case, the Court of Appeals for the District of Columbia has held that parties who would suffer a "practical disadvantage" from judicial reversal of administrative action were entitled

to intervene as of right where there was no "assurance of adequate representation" of their interest by the agency. *Textile Workers Union of America* v. *Allendale Co.*, 226 F. 2d 765 (D.C. Cir. 1955), *certiorari denied*, 351 U.S. 909. In that case, intervention as of right was permitted to unions and a manufacturer in an action brought by another manufacturer to review a ruling by the Secretary of Labor fixing minimum wages to be paid workers producing goods under government contract. The union's members would have received increased wages under the Secretary's order and the manufacturer who sought to intervene competed with the plaintiff manufacturer for government contracts but was forced to pay higher wages in the area in which its plant was located. The court, sitting *en banc*, allowed intervention as of right under Rule 24 (a) (2). 226 F. 2d at p. 768.[20] In addition to the *Kaufman* case, the court relied upon *Wolpe* v. *Poretsky*, 144 F. 2d 505 (D.C. Cir. 1944), *certiorari denied*, 323 U.S. 777, where intervention by private parties under Rule 24(a)(2) was allowed on a showing that the governmental agency, a zoning commission, had refused to appeal a lower court's order enjoining enforcement of a zoning ordinance.

Intervention on the ground of inadequate representation has likewise been permitted in Government antitrust suits. In *United States* v. *Reading Co.*,

[20] Although three of the seven circuit judges sitting in the Allendale case dissented, they did not take issue with the view expressed by the majority that whether intervention should be permitted depended upon the adequacy of the representation of the applicants' interests by the Secretary of Labor. The dissenting judges were of the view that on the facts presented the Secretary adequately represented those interests. 226 F. 2d at pp. 772-773.

273 Fed. 848, 850 (E.D. Pa. 1921), *modified and affirmed sub nom. Continental Insurance Co.* v. *United States,* 259 U.S. 156, a proceeding for the formulation of an antitrust decree, private parties were allowed to intervene in circumstances somewhat analogous to those presented here. In that case this Court had found a holding company to be a combination in violation of the antitrust laws. 253 U.S. 26. On remand, the district court allowed various classes of stockholders of the company to intervene as parties in the hearing on relief in order to assure that the decree to be entered disposing of the company's assets would protect their interests. The appeal to this Court challenging the propriety of the decree was taken by several of the intervenors. In other antitrust cases, intervention has been permitted by a private party whose existing rights against the antitrust defendant would be destroyed under a decree entered at the request of the Government. See *United States* v. *St. Louis Terminal R.R. Ass'n,* 236 U.S. 194, 199; *California Co-Op Canneries* v. *United States,* 299 Fed. 908, 912-913 (D.C. Cir. 1924), *reversed on other grounds after further proceedings,* 279 U.S. 553; see also *United States* v. *Swift & Co.,* 286 U.S. 106, 112.

Appellants' claim of inadequate representation of their interest by the Department of Justice in the proceeding below is grounded upon a showing substantially more compelling than that made by the intervenors in any of the foregoing decisions. Appellants rested their claim of inadequate representation squarely upon the unique nature of the antitrust proceeding in the court below. That proceeding concerned solely the competitive rights under the antitrust laws of the ASCAP

members among themselves. Appellants were members of the only economic group—the ASCAP general membership—in whose interest the proceeding was brought. The relief which was necessary was that which would effectively protect the ASCAP general membership from the continued unlawful competitive injury by the dominating members of the Society which the 1950 judgment had proved inadequate to prevent (R. 49, 119).

The inadequacy of the representation of appellants' interest, moreover, was in no sense speculative. The extent to which the Government proposed to protect their interest against the unlawful competitive injury that was being imposed was made explicit in the agreement that the Government had negotiated with those whose activities were to be curbed, and which it urged the District Court to approve. Yet, as appellants claimed in the District Court and as we show below (pp. 41-53), the modification of the 1950 judgment for which the Government sought approval will achieve no substantial change in the voting and other anticompetitive controls exercised in the Society by the dominating members.

These key facts serve to distinguish appellants' position from that of prospective intervenors who have been denied intervention in other Government antitrust proceedings. These decisions usually have involved attempts to intervene by customers, licensees or competitors of the antitrust defendant, and such parties have been held to have no better standing to intervene than a member of the general public. *E.g., United States* v. *General Electric,* 95 F. Supp. 165 (D. N.J. 1950); *United States* v. *Bearing Distributors,* 1955 Trade Cas. ¶ 68,242 (W.D. Mo. 1955); *cf. United States*

v. *Radio Corp. of America, et al.*, CCH Trade Cas. ¶ 69,774 (E.D. Pa. 1960), *appeal dismissed sub nom. Westinghouse Broadcasting Co.* v. *United States*, 5 L. Ed. 2d 264 (Dec. 19, 1960). Or they have been cases in which the party seeking to intervene was attempting to aid his private litigation against the antitrust defendant, or to seek relief unrelated to that sought by the Department of Justice. See *United States* v. *Bendix Home Appliances*, 10 F.R.D. 73 (S.D.N.Y. 1949); *United States* v. *Loew's, Inc.*, 1957 Trade Cas. ¶ 68,656 (S.D.N.Y. 1957); *United States* v. *Radio Corp. of America*, 3 F. Supp. 23 (D. Del. 1933).[21]

Appellants' motion to intervene presented a wholly different situation. Appellants, as members of the Society, were not simply one of the general public whom the Government's proceeding was designed to

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[21] In 1956, the court below denied motions by other members of the Society to intervene in the litigation. See United States v. ASCAP, 1956 Trade Cas. ¶ 68,524 (S.D.N.Y. 1956). In that instance, the parties seeking to intervene had presented their complaints against the Society's Directors to the Department of Justice only shortly before filing their motion, and the Department was investigating the complaints at the time. See letter of then Assistant Attorney General Hansen, ASCAP Hearings, p. 142. At that time, there could be no showing of a lack of representation by the Government of the prospective intervenors' interest. Here, on the contrary, the proceeding in which appellants sought to intervene was the final judicial stage of a three-year investigation, after which the Department decided to sponsor a modification of the 1950 judgment which did not protect the interest of the Society's smaller members.

An earlier unsuccessful attempt to intervene in this proceeding—United States v. ASCAP, 11 F.R.D. 511, 513, (S.D.N.Y. 1951)—has no bearing at all on the issues presented by this appeal. The applicant-intervenor there was not, and had never been, an ASCAP member and was seeking to litigate in the Government antitrust suit his private dispute with the Society.

protect. Nor were they seeking to further any private litigation with the Society. Rather, they sought to assert adequately the very rights which the Government was purportedly enforcing solely on behalf of the ASCAP general membership. And they sought to request specific relief only with respect to those matters as to which the Government's agreement with the Directors was plainly inadequate to protect the membership from the dominating publishers.[22]

The question whether appellants' interest was adequately represented by the Government cannot therefore be answered by recitation of the truism that the Attorney General is "the guardian of the public interest." Appellants' claim of inadequate representation by the Government is more properly tested by inquiring whether the position taken by the Government in sponsoring the proposed order will achieve a major antitrust purpose of the suit against the Society and a purpose in which appellants have a deep interest—"a democratic administration of the affairs of defendant ASCAP" (R. 45). The proof which appellants were denied the opportunity to adduce in the proceeding below—indeed, the facts which the Government itself represented to the court and the admissions of counsel retained by the Society's Directors—make it plain that the Government had embraced a modification of the 1950 judgment which would surely not achieve a "democratic administration" of the Society, nor even in any substantial way reduce the control of the dominating members. Consideration in some detail of two essential provisions of the proposed order, one of which goes to the heart of the Government's original attack

[22] Compare appellants' Pleading in Intervention (R. 252-258) with provisions of the proposed order set forth at R. 668, 670, 674.

upon the control exercised by the dominating publishers, will demonstrate the inadequate representation by the Government of the interest of appellants and the other smaller members of the Society.

a. The System of Voting—Section IV

Section IV of the proposed order, which deals with the election of Directors, most clearly evidences the inadequate representation of appellants' interest by the Government. In the memorandum submitted to the District Court in support of the proposed order (R. 119 *et seq.*) the Department of Justice, apparently referring to the dominating members of the Society, asserted that it was one of the antitrust purposes of the suit "to make it impossible for certain members to use the Society to obtain an unfair advantage over their competitors"—a purpose which "ASCAP's present rules frustrate" (R. 139-140). Yet Section IV of the proposed order continues the weighted voting system permitted by the 1950 judgment, and in a manner which insures that the dominating publishers and their affiliated members will retain the same control of ASCAP as they have had in the past.

Under the system of voting in effect under the 1950 judgment, as we have pointed out above, pp. 29-30, the ten largest publisher members of ASCAP held about 63 per cent of the total publisher vote (R. 178, 218). Under the proposed order, the ten largest publishers (and their affiliated members)[23] would be able to

[23] An "affiliated publisher member" is defined by the ASCAP Articles of Association as follows (Art. IV, Sec. 1, Par. 4):

> "By the expression 'affiliated' is meant a group of two or more publishing businesses controlled through stock ownership by any one of such group or all of which are either

exercise up to approximately 41 percent of the total publisher vote (R. 149, 177; 188, 218).[24]

Counsel retained by the Society's Directors in the negotiations with the Department of Justice and in the proceeding below acknowledged that the initial voting strength of these publishers would be approximately 37 percent of the total publisher vote (R. 177, 218, 465). But Section IV(C) of the decree permits a ten percent increase in the vote of the ten largest pub-

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directly or indirectly controlled by any other person, copartnership, firm, association or corporation."

See ASCAP Hearings, p. 483. In recognition of the ownership control that may be exercised by the same persons over a group of affiliated publisher members, Article IV, Sec. 1, bars from "election to the Board of Directors as a publisher member thereof, more than one representative from any group of affiliated publishers." The ten largest publisher members have a large number of "affiliated" members whose votes they control (R. 272-276; see also R. 279-283).

All voting figures referred to hereafter are those that have been supplied at one time or another by the Society's Directors. No other figures were available to appellants, and apparently none have been obtained independently by the Government, despite its power under the 1950 decree to inspect the Society's books and records (R. 46-47).

[24] The form of the prior system, under which the number of votes that a member could cast was determined by the revenue he received (see p. 29 n. 15, *supra*), is changed under Section IV of the proposed order, which provides for votes to be determined by the "performance credits" that the member receives under a formula requiring progressively more credits for each additional vote. Sec. IV(B)(1) and (2), R. 674-675. A "performance credit" may be defined as a value assigned to any particular use of a work which is reported in the Society's survey of performances of its members' works. See Sec. (A)(8) of the "Weighting Rules" included as Attachment C to the proposed order, R. 690.

lishers over the voting strength that was initially held by them at the time the proposed order goes into effect (R. 675).[25] Because the new weighted voting formula of the proposed order is in the form of a graduated scale that progressively increases the number of performance credits a member must have for each vote (R. 675), and because the ten largest publishers actually consist of 73 affiliated publisher members (R. 272-276), these publishers may increase their total vote by the permitted ten percent above 37 percent simply by assigning works among their affiliated members so that each affiliate will hold the lowest possible number of performance credits.[26] Appellants suggest that this bloc of 41 percent of the total publisher vote is more than sufficient to permit the largest publishers to continue to thwart one of the antitrust purposes of the suit— "to make it impossible

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[25] No statement has ever been made by either the Government or the Society's Directors explaining the purpose behind this provision that permits a 10 per cent increase in the vote of the ten largest publishers.

[26] The likelihood that this redistribution will occur is suggested by a comparison of the second and third largest publishers in 1958, the Chappell and the Robbins groups. These publishers consist of 19 and 9 affiliated members, respectively (R. 274-275, 276). Although the aggregate performance credits of these two publisher groups were substantially identical in 1958 (R. 272), counsel retained by the Society's Directors declared that under the 1960 decree the second largest publisher would have 393 votes while the third largest publisher would have only 254 votes (R. 219). At its discretion, therefore, the third largest publisher would be able to increase its votes to approximately those held by the second largest publisher merely by creating additional affiliates or redistributing works among its existing affiliates. For this reason, the provisions of Sections VI(A) and (B) of the proposed order

for certain members to use the Society to obtain an unfair advantage over their competitors" (R. 140).[27]

The 41 percent figure, however, does not provide a complete picture of the voting power that will continue to be exercised in the Society by the dominating publishers. To this percentage of their total publisher vote must be added those of the two largest publishers of "serious" music ("standard" publishers), who have been directly represented on the Society's Board in the past and who are not among the ten largest publishers. These publishers have frequently held some three percent of the total publisher vote in recent years,[28] and this may be expected to continue since they are not

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purporting to fix a ceiling of 100 votes per member (R. 674) are wholly meaningless in their application to publisher members, and can be evaded at will.

Appellants have sought to determine through correspondence with counsel retained by the Society's Directors what percent of the total publisher vote was in fact cast by the ten largest publishers in the recent election for ASCAP Directors held in the fall of 1960. Counsel indicated that the ballots had been sealed and that information of this nature had not been disclosed even to the officers or directors of ASCAP. It is not clear how under such conditions the Society—or, indeed, the Government—intends to assure compliance with the limitations imposed on the votes of the ten largest publisher members by Section IV(C) of the proposed order (R. 675).

[27] *Cf.* United States v. Union Pacific R.R., 226 U.S. 61; North American Co. v. Securities & Exchange Commission, 327 U.S. 686, 692-693, 697; Morgan Stanley & Co. v. Securities & Exchange Commission, 126 F.2d 325, 328 (2d Cir. 1942); United States v. Sears, Roebuck & Co., 165 F. Supp. 356, 359 (S.D.N.Y. 1958).

[28] Published information is available from which computations may be made of the percentage of the total publisher vote held by the two largest "serious music" publishers, the Schirmer and

within the overall 41 percent restriction that the 1960 decree imposes upon the ten largest publishers (R. 274-276). The two standard publishers have traditionally allied themselves with the ten largest publishers in controlling the Society's affairs, and no reason can be

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Fischer companies, in the period 1954-1958. These publishers are not among the top ten publishers (R. 274-276), but receive substantial revenue distributions from the Society. Of the nine publishers listed at R. 271-272, the seven other than Schirmer and Fischer are among the top ten. Accordingly, Schirmer and Fischer are the two of these nine publishers who received the least revenue from the Society in 1958—$124,926.50 and $107,781.04. Since the total publisher revenue distributed for 1958 was $10,884,149 (R. 265), the combined revenue of Schirmer and Fischer in this year amounted to approximately 2.2 percent of the total publisher revenue. These publishers therefore held this percentage of the publisher vote in that year (see p. 29 n. 15, *supra*).

Similar computations may be made for the years 1954-1957 based upon information contained in the Record (R. 265) and supplied by the Society's Directors to the Subcommittee of the House of Representatives Small Business Committee, as indicated in the following table:

Year	Total Publisher Distribution (R. 265)	Distribution Received by Schirmer and Fischer	Per Cent of Total Publisher Vote Exercisable by Schirmer and Fischer
1957	$10,343,563	$147,091.38 and $144,331.48	2.6%
1956	$ 9,349,302	$159,442.00 and $124,389.50	3%
1955	$ 8,892,154	$169,387.45 and $124,946.63	3.4%
1954	$ 8,715,265	$197,210.95 and $146,406.53	3.9%

The sources for the figures showing the revenue distributions to the Schirmer and Fischer companies for 1954-1957 are: for 1957, Exhibit No. A6 printed at p. 531, ASCAP Hearings; for 1954-1956, information comparable to that shown in Exhibit No. A6 which was supplied by the House Subcommittee from its files and copies of which have been lodged with the Clerk.

foreseen why they would change in the future. Thus, the votes that will be held by the dominating publishers under the proposed order will be not 41 percent, but 44 percent of the total publisher vote.

One further computation is required to make the picture of voting domination complete. Appellants offered to prove in the District Court that under the proposed order the dominating publishers, including the two largest standard publishers, would hold some 50 percent of the average vote that has been cast and treated as valid in past ASCAP elections. According to figures furnished by counsel retained by the Society's Directors to one of appellants and to the Subcommittee of the House of Representatives Small Business Committee, the publisher votes cast in elections of directors in recent years has been about 88 percent of the total publisher vote. Of the ballots cast, however, some two per cent were unsigned or improperly marked, and were discarded, so that in reality only some 86 percent of the total publisher vote, on the average, was counted in the elections of directors (R. 262, 264; ASCAP Hearings, pp. 545-546). Accordingly, the 41 percent of the total publisher vote which the 1960 decree permits the ten largest publishers to retain will, in practice, constitute approximately 47 percent of the average publisher vote that has been cast and treated as valid. When the votes of the two largest standard publishers are added to this 47 percent retained by the ten largest publishers, it is apparent that the proposed order permits the dominating publishers to retain some 50 percent of the actual publisher vote. The remaining publisher

votes will, of course, continue to be widely dispersed among the 1300-odd remaining publishers.[29]

Appellants respectfully suggest that they are fully entitled to claim that their interest is not adequately represented by the Government when the latter urged upon the District Court a modification of the 1950 judgment which would permit some 50 percent of the actual publisher vote to be retained by the publishers who have dominated the voting, and thus the affairs, of the Society in the past. The Government submitted the voting proposal in the face of the accusations of its own memorandum in the District Court that this group of publishers had totally disenfranchised the other ASCAP publisher members (who are their competitors), had perpetuated themselves in office as members of the Society's Directors, had "established a distribution system (for license fees) which has the effect of favoring certain members at the expense of others" (R. 140), and had suppressed competition in the music publishing industry. The Government's position is consistent neither with the antitrust laws, nor with a "democratic administration of the affairs of ASCAP," nor with an adequate representation of the interest of appellants and other smaller members of the Society.[30]

[29] Counsel retained by the Directors of the Society stated that the 36 largest publishers and their affiliates would hold, under the proposed order, just over 50 percent of the total possible publisher vote (R. 218-219). Since the ten largest publishers and their affiliates then held at least 37 percent, this appears to mean that the 26 publishers who are next in size after the ten largest will hold approximately 13 percent or less. The remaining vote will be divided among the other 1300-odd publisher members.

[30] The recent election of directors under the voting provisions of the proposed order establish that the largest publishers will continue to dominate the affairs of the Society. Although appel-

b. The Survey of Performances—Section II.

A further inadequacy in the Government's representation of appellants' interest is reflected in Section II of the proposed order dealing with ASCAP's survey of performances of its members' works (R. 668-670). The survey is required by Article XI of the 1950 judgment, which directs the Society to make distributions of license fees to the members "on a basis which gives

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lants have been unable to determine the percentage of the vote cast by the largest publishers, these publishers succeeded in re-electing to the Board all of their representatives and the representatives of the two "serious" music publishers who are among the dominating group. The only changes in the composition of the Board were the election of another large publisher, E. H. Morris of the "Morris Group" of affiliates, who is among the ten largest publishers (R. 275-276), and the election of Bernard Goodwin, now a representative of a smaller publisher who had previously served for a number of years on the Board as the representative of one of the largest publishers. See *Billboard*, December 26, 1960; *Variety*, December 28, 1960; ASCAP Hearings, p. 335.

Messrs. Morris and Goodwin were elected by means of the "petition procedure" created by Section IV(E) of the 1960 decree (R. 676), under which publisher members holding one-twelfth of the publisher vote may aggregate their votes to elect a director by petition. It is significant that the publisher directors so elected were a representative of one of the ten largest publishers and an individual who had represented another of the ten largest publishers in the past. This is not surprising in view of the fact that, as already noted (p. 47 n. 29, *supra*), the 26 publishers next in size after the ten largest publishers will hold 13 percent or less of the total publisher vote. These publishers, who are the most likely candidates for a coalition to elect an independent director under the procedure created by Section IV(E), have conflicting economic interests that make it unlikely they would aggregate their votes to achieve the 8.5 percent of the total publisher vote that the section requires. Moreover, included among these 26 publishers are the two largest "standard" publishers, who would not lend their three percent of the publisher vote to any such combination, so that a successful combination by the remaining 24 publishers is even less likely.

primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances . . . periodically made by or for ASCAP" (R. 44). The information supplied by the survey with respect to performances of works on various media forms the basis for distribution of license revenues to the Society's members. The Department of Justice memorandum in support of the proposed order asserted that ASCAP did not conduct the "objective surveys" required by the 1950 decree (R. 121-122). Yet the proposed order itself makes no effort to deal with one of the two major reasons for the lack of objectivity.

The survey consists of two distinct operations: first, the collection and collation of information concerning the performances surveyed; second, the application to this information of various mathematical and statistical computations. Section II of the proposed order undertakes only to make the mathematical computations applied in the second step of the survey more accurate. It makes no mention of, and does nothing to correct, the method by which the survey information is originally collected and collated. Obviously, if the original information which is fed to the survey sampling formula is inaccurate or misinterpreted, the most accurate mathematical formula devised can do nothing but compound error. Herein lies the fundamental failure of the Government adequately to represent appellants' interest in securing a survey which would accurately and reliably reflect the performances of the members' works.

Appellants sought to bring before the District Court evidence such as that adduced in the ASCAP Congressional Hearings, where it was disclosed that the entire

method by which ASCAP collects its survey information is inaccurate and unreliable.[31] The Government, although it was aware of such evidence (see R. 121-122) and did not dispute it, nonetheless acquiesced in a continuation of the same procedure. Under the proposed order, as under the 1950 decree, the personnel collecting the survey information will continue to operate on the ASCAP premises under the supervision of Directors controlled by the dominating publisher members who may directly benefit from the manner in which the supervision is exercised.

Moreover, nothing in the proposed order prohibits the Directors from continuing, as they did under the 1950 judgment, to make verbal and subjective interpretations that may, among other things, affect the weight to be given to a particular performance of a work reported in the survey, and that will be made prior to, and independently of, the application of the survey sampling formula itself. The Directors thus retain the power under the proposed order to influence the interpretation of the basic performance data that comprise the source information to which the survey formula is to be applied, and thereby to influence the license fee payments members receive (R. 384-386). Since the Directors of the Society are in effect trustees of the funds collected for all ASCAP members, they are permitted by the proposed order to have a direct conflict of interest resulting from their position as representatives of individual publishers. In fact, as appellants proposed to show in the District Court, an accurate, fair and impartial survey can be secured only through the use of an independent

[31] *E.g.*, ASCAP Hearings, pp. 70-71, 82-84, 427, 429-441.

survey organization which would insulate the system from any possibility of influence or control by any ASCAP member (R. 387-388).

The provisions of the proposed order with respect to voting and the survey of performances provide the clearest indications of the inadequate representation by the Government of appellants' interest. In order not to extend unduly the consideration of this question, we refer only briefly to the portions of the proposed order that fix the distribution by the Society of license revenues to the members for various types of performances of their works reported in the survey. See Sec. III(F), and "Weighting Rules" and "Weighting Formula" (R. 674, 689-694, 704-714). Appellants asserted below that these provisions, which were designed to deal with existing revenue distribution practices of the dominant publishers that the Government itself had complained "put certain members of the Society at a tremendous competitive disadvantage" (R. 119, at p. 137), did not eliminate this disadvantage but rather codified and perpetuated a system of distributing license revenues that would have the effect of continuing to favor the performances of the works of the large publishers (R. 395-399).

The basic inadequacy of this portion of the proposed order lies in the fact that it permits discrimination in the distribution of license revenue between musical works that are reported in the survey as having been performed for the same "use."[32] Under the prior practice, the "competitive disadvantage" permitted one song to "earn" as much as 1000 times more perform-

[32] A "use" is defined in the proposed order as "a performance of a composition reported by the ASCAP survey." Weighting Rules, Sec. (A)(6), R. 690.

ance credits than another song when each was used by a licensee of the Society in exactly the same way and for exactly the same amount of time (R. 137). Under the proposed order, the discrimination is merely palliated, rather than eliminated. Appellants asserted, moreover, not only that such a discrimination among works performed for the same "use" was inequitable, but also that the specific standards incorporated in the proposed order assure that the greater performance credits for the same "use" would be awarded largely to the works of the largest publishers.

Because of the status as *amici curiae* to which appellants were limited by the District Court, they were unable to obtain and introduce proof in detail as to the full effect of the proposed order in this respect. The record shows, however, that as to one category of "use" —theme music[33]—counsel retained by the Society's Di-

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[33] A "theme" is defined as "a musical work used as an identifying signature of a radio or television personality or all or part of a radio or television program or series of programs" (R. 689). The types of "non-feature uses" (of which a "theme" is one)—"uses" other than for full or "feature" performances—for which a work that meets the tests of the proposed order may receive added performance credits are set forth in the "Weighting Rules". See R. 689-690.

The Society distributes a large portion of its revenues for "non-feature uses." During a nine-month period in 1957 for which figures are available, non-feature uses represented some 37 percent of the performances of the members' works reported in the Society's survey of performances (R. 267), and in that year over $6,000,000 was distributed for performances by licensees of "themes" and one other category of non-feature use, "background music" (R. 137). The importance of non-feature uses is further illustrated by the fact that twelve works contained in a list supplied by the Society's Directors have earned more performance credits for performances as themes and background music than the entire catalogue of either Irving Berlin or Oscar Hammerstein (R. 137).

rectors pointed out that 360 out of 377 works in which the publisher members of the Board had an interest in 1958 and which were receiving added credits under the prior practice would continue to qualify for extra performance credits under the proposed order, and some of the remaining 17 might qualify (R. 212-213).[34] Full disclosure of the facts would permit a similar analysis to be made of the potential discrimination in other "use" categories that will exist under the proposed order.

These inadequacies in the proposed order, taken together with appellants' status as members of the Society whom the Government had undertaken to protect, fully substantiate appellants' claim that they were inadequately represented by the Government in the proceeding below.

Moreover, contrary to what the District Court appeared to believe, the representation by the Government of the interests of appellants and other smaller members of the Society could not be found to be adequate on a mere showing that the proposed order constituted an "improvement"—however small—over the 1950 judgment. Several times in the course of the proceeding below the court suggested that it considered it important to know whether the provisions of the proposed order were even a slight "improvement" (R. 374, 379, 386, 404), and seemed to be of the view

[34] There was some uncertainty about 73 of the 360 works, but it appears clear that they would qualify as older works that had been first performed before January 1, 1943 (R. 212). In order to qualify for added performance credits, such older works need only accumulate 20,000 performance credits since that date, which counsel retained by the Society's Directors declared would be likely for any such work that could not otherwise qualify (R. 211).

that, if so, it was warranted in approving the proposed order. Such statements by the court suggest that it believed that the ASCAP general membership was required to be content with the Government's negotiation of a bare minimum of further protection from the dominating publishers in the Society.[35] This view is opposed to the recent pronouncements of this Court in *System Federation* v. *Wright*, No. 48, October Term, 1960, decided January 16, 1961. The Court there indicated that in approving a consent decree that is entered in the enforcement of a federal statute, such as the antitrust laws, the court's "authority . . . comes only from the statute which the decree is intended to enforce", and that "the adopting court is free to reject agreed-upon terms as not in furtherance of statutory objectives . . ." (slip opinion, p. 9). The standard, therefore, by which the court below should have measured the Government's representation of appellants' interest was not whether the proposed order was an "improvement" over the 1950 judgment but whether it brought the competitive relations of the ASCAP members among

[35] The court's position in the proceeding below was not in keeping with its prior remarks expressed at a conference on June 19, 1959, at which it considered with Department of Justice attorneys and counsel retained by the Directors the procedure to be followed with respect to a hearing on the proposed order. In commenting upon the summary procedure that had been proposed by the Department and the Directors (R. 51-52), the court stated (R. 59-60):

> "But there is something basically different between us, and that is our philosophical approach to the responsibilities and obligations of the Court with reference to these final consent decrees in antitrust litigation.
>
> "I feel that the Court has a duty, independent of that of the Antitrust Division, a duty to see that the purpose of the statute is carried out in the proposed decree."

themselves into harmony with Section 1 of the Sherman Act, the statute under which the Government had sought relief on behalf of the general membership against the domination of the Society's affairs by its largest members.

3. APPELLANT'S POSITION AS AMICI CURIAE IN THE DISTRICT COURT

No doubt it will be urged by appellees that appellants' interests were adequately served by the permission accorded them to address the court below as *amici curiae*. Quite the contrary is true.

Appellants, in supporting their motion to intervene, did not merely criticize the provisions of the proposed order. They undertook to point out specific modifications that they were prepared to prove were necessary adequately to protect the competitive position of the smaller members of ASCAP from the dominating publishers. Appellants proposed, for example, alternative methods for distributing voting power within the Society, some of which are suggested in federal and state statutes for other forms of unincorporated associations (R. 376-377; DR. 1105-1107). See ASCAP Hearings, pp. 232-233. Appellants also urged that equal representation of the three major publisher groups—small, medium and large publishers—on the Board of Directors, or four representatives of each group on the twelve-man Board, would effectively insure "a democratic administration" of the Society's affairs (R. 372).[36] Again, appellants were prepared

[36] The District Court expressly rejected a weighted voting system for its own referendum on the proposed order (see pp. 57-58, *infra*), yet it refused to grant appellants a standing to demonstrate the necessity for an amendment to the 1950 decree which would abolish weighted voting for the election of the Board of Directors of the Society.

to prove the necessity, and the feasibility, of having the Society's survey of performances conducted by an independent survey organization, which would be completely insulated from any possibility of influence or control by any ASCAP members (R. 387-388).

As *amici*, however, appellants were unable to affect the procedure to be followed by the court and the parties below in ruling upon the proposed order. They were, accordingly, severely restricted both in their criticism of the proposed order and in the presentation of their own proposals. Appellants were not permitted by the District Court even to make offers to submit proof to demonstrate the inadequacy of the proposed order, and to substantiate their own proposals and the necessity that they be incorporated in any amendments to the 1950 judgment (R. 371). Appellants were allowed only to argue through counsel that the proposed order should be rejected as a whole.[37]

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[37] The District Court stated on several occasions that it was powerless to do more than either accept or reject the proposed order *in toto*, and that if it did the latter, the only course then open to the Government to secure relief was a full trial of the issues raised by the 1941 complaint (R. 371-373, 383, 388-389, 405). Moreover, the Court repeatedly stated that it could not receive testimony on any proposed amendment to the 1950 judgment and yet have the judgment remain a consent decree, and finally stated (R. 389): "I cannot take testimony on [an amendment to] a consent decree unless I have the consent of both parties to a litigation, and that I so hold." The Court refused to hear argument to the contrary (R. 405). Yet the 1950 decree itself, in Article XVII, expressly permits the Government "on reasonable notice" to apply to the District Court for modification of that decree "in any respect" (R. 47). It is impossible to know how much this error on the part of the District Court contributed to its decision to deny appellants' motion to intervene. See pp. 63-68, *infra*.

Finally, as *amici*, appellants will be barred from proceeding further in this Court or in the court below to protect their interest. Unless appellants become intervenors, they will be unable to seek review of the District Court's refusal to permit proof that would have shown the insufficiencies of the proposed order, and of the court's approval of the order as it was submitted by the Government and the Society's Directors. It is settled that an *amicus curiae* has no standing to appeal from a judgment. *E.g., Denver* v. *Denver Tramway Corp.*, 23 F. 2d 287, 295 (8th Cir., 1927), *certiorari denied*, 278 U.S. 616; *Winter Haven* v. *Gillespie*, 84 F. 2d 285 (5th Cir. 1936), *certiorari denied*, 299 U.S. 606.

A final word is warranted on the membership vote directed by the District Court. As already noted (pp. 14-15), that vote disclosed that the proposed order is opposed by more than 40 percent of the Society's publisher members and more than 30 percent of the writer members who cast valid ballots. All of these presumably were ASCAP members who were not permitted to take part in or to influence the negotiations between the Department of Justice and the Directors on the terms of the proposed order.

The voting procedure directed by the District Court called for the members of the Society to vote for or against the proposed order in its entirety (R. 477). The ASCAP members were confronted, therefore, with a choice between the proposed order or a continuation of the patently anticompetitive and injurious practices of the Society under the 1950 judgment. Moreover, the members were required to vote without benefit of the proof that appellants sought to present

on the deficiencies of the proposed order and as to the reasonable alternatives, and without benefit of the further facts that they might have elicited by discovery procedure. That there was nonetheless a very large but voiceless minority within the Society who were opposed to the proposed order underscores appellants' contention that the Government inadequately represented the interest of appellants in securing a decree which would protect the general membership from the Society's dominating publisher-members.

B. APPELLANTS ARE OR MAY BE BOUND BY THE PROPOSED ORDER

The order of the District Court denying appellants' motion to intervene does not refer directly to the second requirement of Rule 24(a)(2)—that one who seeks to intervene must establish that he is or may be bound by a judgment in the action. The ruling of the court made in the course of the proceeding below stated that one basis for the denial of appellants' motion was that they "were not a named party to the suit, and the suit had proceeded to a consent judgment" (R. 381). The final order recites (R. 489) "that applicants have permitted this cause in which they are not named as parties to proceed to judgment." If these statements were intended to relate to the question whether appellants are or may be bound by the proposed order, neither of the two objections which appear to be included in this portion of the District Court's ruling can be sustained.

1. The statement that appellants were not named parties to the suit by the United States appears to reflect an argument advanced by appellees in the court below. They there urged that because the 1941 antitrust suit was brought against ASCAP as an entity, under the antitrust laws and Rule 17(b)

of the Rules of Civil Procedure,[38] appellants could not establish that any judgment in the suit would bind them as members of ASCAP.

Neither the premise nor the conclusion of the argument can be sustained. The complaint filed by the United States in 1941 instituted a representative action against the Society and its then officers as representatives of the membership. Paragraph 3 of the complaint alleged:

> "That the members of the Society other than those members thereof specifically named herein constitute a group so numerous that it would be impractical to bring all of them on before the Court by name; therefore, the aforesaid defendants named and described herein are sued as representing all members of the Society" (R. 9).[39]

And Paragraph 18 of the complaint alleged that the complaint was filed against the defendants, the Society, "its officers and directors, *and the members thereof*, because of their violations, jointly and severally" of the Sherman Act (italics added) (R. 18).

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[38] Section 8 of the Sherman Act and Section 1, paragraph 3 of the Clayton Act provide that any association existing under or authorized by the laws of any state shall be considered a "person" wherever that word is used in the antitrust laws (15 U.S.C. Secs. 7, 12).

Rule 17(b) of the Federal Rules of Civil Procedure provides that an unincorporated association which has no capacity to be sued as a legal entity under state law may nevertheless be sued in its common name "for the purpose of enforcing . . . against it a substantive right existing under the . . . laws of the United States."

[39] The "aforesaid defendants" were the then president, secretary and treasurer of the Society.

The allegations of the 1941 complaint thus indicate that the Government has viewed its antitrust suit as a representative action brought pursuant to Rule 23(a)(1) of the Federal Rules.[40] This Court's opinion in *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, makes it clear that in such a suit any judgment entered for or against the representatives of a class—here the ASCAP membership—would be *res judicata* as to all the members of the class.[41]

Moreover, the result would be no different even were the suit deemed brought pursuant to Rule 17(b). This rule merely establishes the capacity of an unincorporated association to sue or to be sued in the federal courts to enforce a substantive right existing under the laws of the United States. Rule 17(b) could only strengthen the conclusion that a judgment against an

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[40] Somewhat earlier the Directors of the Society themselves invoked the class suit device in litigation involving the rights of ASCAP members. Gibbs v. Buck, 307 U.S. 66, 68, 73; Buck v. Gallagher, 307 U.S. 95, 97.

[41] In the Ben-Hur case the Court held that members of a class of certificate holders of an unincorporated insurance association could not sue to prevent the association from undertaking, among other things, a reclassification of its membership when the issue had been litigated in a suit previously brought by other certificate holders on behalf of the class. The Court found that the certificate holders in the second suit had been represented in the first suit through other certificate holder plaintiffs, and that the decree in the prior suit adjudicating the authority of the association to reclassify the membership was binding upon the certificate holders bringing the second suit. See also Stella v. Kaiser, 218 F. 2d 64, 65 (2d Cir. 1955), *certiorari denied*, 350 U.S. 835. So here, for example, the specification of a system of voting in the proposed order will bar appellants or other ASCAP members from relitigating the issue of the kind of voting system that the antitrust laws require of the Society.

association in such a suit would be *res judicata* as to its membership, for the member's position under the rule is comparable to that of a shareholder whose corporation is sued as an "entity." Indeed, as the Court of Appeals for the Fourth Circuit made clear in *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. 2d 403 (4th Cir. 1945), representative actions under Rule 23(a) and "entity" suits under Rule 17(b) may be used interchangeably to enforce claims existing under the laws of the United States, since no issues of federal diversity jurisdiction are presented in such litigation.[42] See also *Underwood* v. *Maloney*, 256 F. 2d 334, 341 (3d Cir. 1958), *certiorari denied*, 357 U.S. 865; 3 Moore, *Federal Practice*, pp. 3435-3436 (2d ed. 1948).[43]

The effect, therefore, of the Government's suit under either Rule 23(a)(1) or Rule 17(b) would be to bar all ASCAP members from challenging as illegal under the antitrust laws any practices that a judgment entered therein required the Society to follow. The proposed order directs the Society to take certain actions

[42] The opinion in the Tunstall case stated (148 F. 2d at p. 405):

> "... The manifest purpose of the provision of rule 17(b) relating to suits against partnerships and unincorporated associations is to add to, not to detract from, the existing facilities for obtaining jurisdiction over them. The language of rule 17(b) relating to suits against partnerships and unincorporated associations is permissive. So also is the language of rule 23(a). Together they provide alternative methods of bringing unincorporated associations into court."

[43] Cases such as Sperry Products, Inc. v. Association of American R.R., 132 F. 2d 408 (2d Cir. 1942), which hold that a suit against an unincorporated association pursuant to Rule 17(b) is not a "class" action, are obviously irrelevant. Such decisions neither involve nor determine the *res judicata* effect on the members of an association of a decision in the suit involving the association.

with respect to the voting for Directors, the conduct of the survey of performances, and the distribution of license fees. If appellants were to challenge as illegal under the antitrust laws such actions taken by the Society pursuant to the decree, their suit would in effect seek to compel the Society to take action other than that prescribed by the proposed order, which binds them as well as all other members of ASCAP. Appellants believe that the principles set forth in *Supreme Tribe of Ben-Hur* v. *Cauble, supra,* would defeat any such attack.

2. The second part of the court's ruling—that a consent judgment had been entered in the action—needs no extended comment. The fact that a judgment has been entered in an action provides no ground for a refusal to permit intervention where further proceedings are necessary without which the interest of the party seeking to intervene could not otherwise be protected. Thus, intervention pursuant to Rule 24(a)(2) has been authorized in order to allow the intervening party to take an appeal when the party that had represented his interest before a judgment was entered unjustifiably refused to do so. *E.g., Pellegrino* v. *Nesbit,* 203 F. 2d 463, 465-466 (9th Cir. 1953); *Wolpe* v. *Poretsky,* 144 F. 2d 505 (D.C. Cir. 1944), *certiorari denied,* 323 U.S. 777. So here, although the Department of Justice undertook further proceedings to protect the interests of appellants and other ASCAP members, its efforts, appellants contend, were largely inadequate. If this was the case, the fact that a judgment had once been entered in the suit is of no relevance in determining whether appellant's requested intervention in the re-opened proceeding should be allowed.

III

A MODIFICATION OF THE 1950 CONSENT JUDGMENT MAY BE SOUGHT BY THE GOVERNMENT AND ENTERED BY THE DISTRICT COURT OVER THE OBJECTION OF THE SOCIETY OR THE APPELLANTS WERE THEY PERMITTED TO INTERVENE.

The Motion to Affirm submitted by the Government (pp. 10-11) apparently raises a question that was of concern to the District Court, although not directly involved in the court's denial of intervention. The Government has taken the position that if appellants are permitted to intervene in the proceeding below, "their consent to change in the [1950] judgment would be necessary and, by withholding their consent, they could exercise power of veto over entry of any consent judgment modifying the 1950 judgment." (p. 11). The District Court apparently was of the same view, but it dealt with the issue in somewhat different terms. As we have already noted (p. 56 n.37, *supra*), the court repeatedly stated in the course of the proceeding below that it could not receive testimony on the proposed amendments to the 1950 judgment and yet have the decree remain a consent decree, and that the alternative to a consent modification of the 1950 judgment was no modification at all or a trial on the merits of the Government's 1941 complaint against the Society.[44]

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[44] The District Court's position at the October 19 proceeding differs markedly from the view it expressed at the hearing on June 19, 1959, which was attended only by Department of Justice attorneys and counsel retained by the Directors (see p. 54 n. 35, *supra*). Questioned by a Department attorney as to whether the court would take testimony on the proposed order, the court responded that it had not yet decided "whether or not . . . there should be testimony taken to assure me, as the judge, that [the] public interest is being amply protected [by the proposed order]"

Although the position of the District Court on this question is not entirely clear and the views of the Government are not elaborated in its Motion to Affirm, it is evident that the attitude of the court below and of the Government toward appellants' requested intervention has been influenced by their understanding of the effect such intervention would have upon the future course of proceedings to modify the 1950 judgment. We believe it proper, therefore, pending elucidation of the Government's views, to state briefly our own understanding of whether a modification of the 1950 judgment could be sought by the Government and entered by the District Court despite objection by the Society or by appellants were they permitted to intervene.

1. The 1950 judgment itself plainly authorizes the Government to apply to the District Court for "modification in any respect." The Government expressly reserved this power in Article XVII of the judgment (R. 47). The article first sets forth the language typically found in antitrust decrees retaining jurisdiction in the court:

> "Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Amended Final Judgment to make application to

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(R. 56). The court thereafter stated: "Now I may have to take testimony in order to satisfy myself that this modification is of public interest. I may have to take testimony concerning the present condition of the industry . . ." (R. 57-58). At a further hearing on June 29, 1959, the court reaffirmed that it was empowered to take testimony on the proposed order, and that since the order was "an amended [sic] to a final consent decree, it would still be a consent decree" (R. 72). The court's ruling at the October 19 proceeding that no testimony could be taken and that the proposed order must be approved *in toto* or not at all can not be reconciled with these earlier views.

the Court for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof."

The article then states:

"It is expressly understood, in addition to the foregoing, that the plaintiff may, upon reasonable notice, at any time after five (5) years from the date of entry of this Amended Final Judgment apply to this Court for the vacation of said Judgment, or its modification in any respect, including the dissolution of ASCAP (and at any time within two (2) years from said date apply to this Court for the vacation or modification of Section V(C) hereof). . . ."[45]

The only reasonable construction of the second paragraph of Article XVII is that a modification applied for by the Government under its terms could be entered over the objection of the Society if an adequate showing were made by the Government in an evidentiary hearing on the issues raised by the proposed modification. This is suggested by the language of the paragraph which specifically provides that the further modification sought by the Government could include "the dissolution of ASCAP". Such relief would surely not be consented to by the Society or any of its members, including the appellants here.

2. Even apart from the express, agreed-to reservation of power in the Government contained in Article

[45] The parenthetical clause relates to a portion of the 1950 judgment that affects only the relations between ASCAP and those whom it licenses to perform its members' works.

XVII, the Government would have the power to request, and the District Court to order, a modification of the 1950 judgment over the objection of any other parties. This Court has ruled that a contested modification of an antitrust consent decree may be ordered if there is "a hearing that included evidence and a judicial determination based on it." *Hughes* v. *United States*, 342 U.S. 353, 358.

The *Hughes* case was an appeal by a party to an antitrust consent decree objecting to a contested modification of the decree that had been ordered by the district court without hearing evidence or making findings of fact. Pursuant to a consent decree entered following the decision in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, two companies had been formed from a division of the assets of one of the motion picture defendants, Radio-Keith-Orpheum Corporation. The consent decree directed Hughes, who had a large stock interest in both companies, either to dispose of his holdings in one or the other company, or to deposit his stock in both companies with a voting trustee until he had sold his stock in one company. Hughes elected to trustee his stock, and the district court approved the terms of the voting trust. Thereafter, the Government requested the district court to compel the trustee to sell the stock, which the court did in a summary proceeding. In reversing the order of the district court because there had been no "adequate hearing" as to whether the modification of the decree sought by the Government was justified, this Court declared that it did not doubt the district court's power to order sale of the stock after a proper hearing.

In *Liquid Carbonic Corp.* v. *United States*, 350 U.S. 869, *reversing*, 123 F. Supp. 653 and 121 F. Supp. 141

(E.D.N.Y. 1954), the Court again was presented with the question whether a substantial modification could be ordered in an antitrust consent decree without a hearing. On the authority of the *Hughes* case, the case was remanded to the district court "for a hearing on modification of the consent decree."

The *Hughes* and *Liquid Carbonic* decisions would appear to dispel doubts as to the propriety of a contested modification of the 1950 judgment if the necessity for the change sought by the Government is supported by appropriate evidence at a hearing before the District Court. The Department of Justice itself has so interpreted these cases.[46] Indeed, the decisions appear to be merely applications to the antitrust field of the general principle recently reaffirmed by this Court that a court of equity has inherent power to modify its decrees—whether entered after litigation or by consent—as warranted by circumstances. *System Federation* v. *Wright*, No. 48, October Term, 1960, decided January 16, 1961. See also *United States* v. *Swift & Co.*, 286 U.S. 106; *Chrysler Corp.* v. *United States*, 316 U.S. 556.

There are, therefore, two independent sources of authority—Article XVII or the *Hughes-Liquid Carbonic* line of decisions—upon which a modification of the 1950 judgment could be sought by the Government and ordered by the District Court. Under either, the opposition of the Society, or of appellants were they

[46] Hearings Before the Antitrust Subcommittee (Subcommittee No. 5) of the House Committee on the Judiciary, 85th Cong., 2d Sess., ser. 9, part II-vol. III, pp. 3748-3749 (1958). See Subcommittee No. 5, House Committee on the Judiciary, Report on "Consent Decree Program of the Department of Justice", dated January 30, 1959, pursuant to H.R. Res. 27, 86th Cong., 1st Sess., pp. 5, 293.

permitted to intervene, would have the effect only of requiring proof to be adduced in support of such a proposed modification. If this is the case, the fears expressed by the Government, and by the District Court, as to the consequences of allowing intervention by appellants are unjustified and may properly be disregarded.

CONCLUSION

For the reasons set forth above, the order of the District Court denying appellants' motion to intervene pursuant to Rule 24(a)(2) should be reversed, and the case remanded to the District Court for further proceedings.

Respectfully submitted,

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